

No. 82-1909

Office - Supreme Court, U.S.

F I L E D

JUN 28 1983

ALEXANDER I. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SCOOBA MANUFACTURING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF THE QUESTION
PRESENTED**

Does the mere interjection of a prounion remark into a personal dispute between an employee and her supervisor automatically render subsequent, and otherwise lawful, disciplinary action a violation of Section 8(a)(1) and (3) of the National Labor Relations Act?

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**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

Respondent, Scooba Manufacturing Company, Inc.,¹ respectfully requests that this Court deny the National Labor Relations Board's Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 20, 1982.

¹Respondent Scooba Manufacturing Company, Inc., a Mississippi Corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

OPINIONS BELOW

The opinion of the court of appeals, (App. A, *infra*, p. 1a) is reported at 694 F. 2d 82. The decision and order of the National Labor Relations Board is reported at 258 N.L.R.B. 147.

JURISDICTION

The jurisdictional statement in the Petition is correct. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U. S. C. § 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

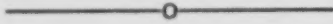
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c), provides in pertinent part:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause.



STATEMENT OF THE CASE

1. On May 22, 1980, Lucille Willie, an employee of the Respondent, and George Welch, Vice President of the Respondent, entered into a "heated argument" (App. A, *infra*, p. 1a). The dispute began as a discussion concerning the recent discharge of Willie's son (*id.* at 2a). However, the focus of the dispute shifted to Willie's own production and absenteeism problems (*id.*). In the ensuing argument, Willie cursed Welch and was generally insubordinate in her manner and tone of speech (Petition, App. C, p. 14a).² Willie then left Welch's office.

²The substance of the argument between Welch and Willie was disputed at the Board's hearing. Welch testified that Willie used curse words several times during their argument (Petition, App. C, p. 14a). This was corroborated by Plant Manager White who was present during the argument (*id.* at 15a). Willie, on the other hand, admitted only to infrequent cursing (*id.* at 13a). Further, both Welch and White testified that Willie was disrespectful and insubordinate during the argument (Record, Vol. 2, pp. 19, 30, 31, 111-12, 126-29). The Fifth Circuit's opinion denying enforcement on other grounds rendered unnecessary a ruling on this point, which has been preserved by Respondent.

Shortly thereafter Willie returned and, feeling "piqued by the preceding discussion," made a remark to Welch concerning a union.³

As a result of this dispute, Welch decided to discipline Willie.⁴ Welch told Willie to leave the plant and come back Monday with her husband to discuss the situation (App. A, *infra*, p. 2a). Willie testified that she knew she could return to work on Monday if she had followed Welch's instructions (Record, Vol. 2, pp. 73-74, 77-78). This fact notwithstanding, Willie never returned to work.⁵

2. As a result of the foregoing facts, Willie filed an unfair labor practice charge with the National Labor Relations Board. A hearing was held before an Administrative Law Judge ("ALJ") who found that Respondent had discharged Willie in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, 29 U. S. C. § 158 (a) (1) and (3), by "threatening employees with discharge if they initiated a union organizational campaign or

³During the period in question Willie never engaged in any union activity, no labor organization represented the Scooba workforce, and there had never been a union organizing campaign at the plant (App. A, *infra*, p. 3a).

⁴Whether Welch's decision to discipline Willie was made before or after her remark concerning a union was a hotly contested issue at the hearing. The issue was also raised and argued before the court of appeals. The court's disposition of the case, however, rendered a determination of the issue unnecessary. This issue has been preserved by the Respondent.

⁵This issue was raised and argued before the court of appeals, *i. e.*, that Willie's alleged "discharge" constituted only a two day suspension. Indeed, Willie's intentional failure to return to work has resulted in these protracted proceedings. Since the court's decision rendered a determination of the issue unnecessary, Respondent has preserved the issue.

[sought] union aid" and by discriminatorily discharging Willie (Petition, App. C, p. 22a). The National Labor Relations Board affirmed the ALJ's decision (*id.* at 7a).

3. The court of appeals denied enforcement of the Board's order (App. A, *infra*, p. 5a). The court found Willie's remarks to be "the product of a purely personal dispute" (*id.* at 4a). The court recognized that an employee who acts alone is not precluded from the protection of Section 7 of the National Labor Relations Act, 29 U. S. C. § 157 (*id.* at 3a). However, the court held that in order for the individual's actions to be protected, the individual employee "must be engaging in the activity with the object of initiating, inducing or preparing for group action" (*id.*) After searching the record "in vain" for evidence of "talk looking toward group action," the court concluded that the dispute between Willie and Welch had been "purely personal," and therefore, Willie was not entitled to the protection of Section 7 (*id.* at 4a). Further, the court held that the mere use of the word "union" in a conversation between an employee and his superior did not "automatically" invoke Section 7's protections (*id.* at 5a).⁶ The Board's petition for rehearing was denied (App. B, *infra*, p. 6a).

⁶The court's implicit finding that Welch was not motivated by antiunion considerations in disciplining Willie is supported by the evidence (Record, Vol. 1, p. 182, Vol. 2, pp. 56-57, 160-61, 166-68).

REASONS FOR DENYING THE PETITION

The Fifth Circuit's decision holding that Willie's purely personal dispute with Welch did not constitute protected activity under Section 7 is unrelated to the question presented by this Court's review of *City Disposal Systems, Inc. v. NLRB*, 683 F. 2d 1005 (6th Cir. 1982), cert. granted, No. 82-960 (March 28, 1983). Further, the decision is not in conflict with decisions of other circuit courts of appeals and the question presented is not a significant issue in the administration of the National Labor Relations Act.

1. The question presented in the *City Disposal Systems* case is whether the National Labor Relations Board properly concluded that an individual employee's reasonable assertion of a right provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the Act. The case involves an individual employee's efforts to assert occupational safety rights embodied in an existing labor agreement. This Court's review of the *City Disposal Systems* case should resolve the controversy surrounding the "*Interboro* doctrine," i. e., that a single employee's attempt to enforce the provisions of a collective bargaining agreement constitutes activity protected by Section 7 "even in the absence of such interest by fellow employees." Clearly, the circuit courts of appeals are deeply divided on this issue.⁶

¹*NLRB v. Interboro Contractors, Inc.*, 388 F. 2d 495, 500 (2nd Cir. 1967).

²The Second, Seventh and Eighth Circuits have approved the *Interboro* doctrine: *NLRB v. John Langenbacher Co.*, 398

The instant case involves neither a union nor a collective bargaining agreement. Willie's "purely personal dispute" with Welch concerning deficient production and absenteeism *does not* implicate the occupational safety or contract rights present in the *City Disposal Systems* case.

Petitioner asserts that the Board has extended Section 7 protection to individual employees where their action affects other employees even in the absence of a collective bargaining agreement (Petition, p. 6). Respondent is unaware of *any* court of appeals decision that has accepted this view.⁹ Since an individual employee's assertion of rights under a collective bargaining agreement is the cornerstone of the Board's position in *City Disposal Systems* (Petition, p. 7), an issue not present in the instant case, no useful purpose would be served by delaying this Court's consideration of the Petition.

(Continued from previous page)

F. 2d 459, 463 (2nd Cir. 1968), cert. denied, 393 U. S. 1049 (1969); *NLRB v. Ben Pekin Corp.*, 452 F. 2d 205, 206 (7th Cir. 1971); *NLRB v. Town & Country LP Gas Service Co.*, 687 F. 2d 187, 191 (7th Cir. 1982); *Pelton Casteel, Inc. v. NLRB*, 627 F. 2d 23, 28 n. 10 (7th Cir. 1980); and *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F. 2d 217, 219-221 (8th Cir. 1970). The Third, Fourth, Fifth, Sixth and District of Columbia Circuits have rejected it: *NLRB v. Northern Metal Co.*, 440 F. 2d 881, 884-85 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F. 2d 714, 719 (5th Cir. 1973); *ARO, Inc. v. NLRB*, 596 F. 2d 713, 716-717 (6th Cir. 1979). See also *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 306-310 (4th Cir. 1980); *Kohls v. NLRB*, 629 F. 2d 173, 176-177 (D. C. Cir. 1980), cert. denied, 450 U. S. 931 (1981).

⁹Every court of appeals that has confronted the issue has ruled to the contrary. See *Ontario Knife Co. v. NLRB*, 637 F. 2d 840, 845 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 309 (4th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F. 2d 1238, 1242 (9th Cir. 1980).

2. The Fifth Circuit's decision is not in conflict with the decisions of other courts of appeals. The court found that Willie's "purely personal dispute" and "heated argument" with Welch were not concerted activity protected by Section 7.¹⁰

The Fifth Circuit applied the universally accepted legal standard for determining the presence of "concerted" activity where no applicable collective bargaining agreement exists.¹¹ It recognized that the actions of an individual employee could be "concerted" within the meaning of the Act, and therefore, protected by Section 7, even in the absence of an existing collective bargaining agreement (App. A, *infra*, p. 3a). In order to be protected, however, the court of appeals determined that the individual employee had to be engaging in activity "with the object of initiating, inducing or preparing for group action" (*id.*).

The law is well settled that personal disputes are not protected by Section 7.¹² The court "searched the record

¹⁰Section 7, by its terms, protects the rights of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection. . . ." Thus, a threshold question in any Section 7 case is whether the action sought to be protected was, in fact, "concerted" action. To ignore the concertedness requirement of Section 7 would amount to emasculating the clear meaning of its terms.

¹¹See *Ontario Knife Co. v. NLRB*, 637 F. 2d 840, 845 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 307 (4th Cir. 1980); *Pelton Casteel, Inc. v. NLRB*, 627 F. 2d 23, 28 (7th Cir. 1980); *ARO, Inc. v. NLRB*, 596 F. 2d 713, 718 (6th Cir. 1979); *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706, 708 (1st Cir. 1975); *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683, 685 (3d Cir. 1964).

¹²See *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683, 685 (3d Cir. 1964); *Tabernacle Comm. Hos. & Health Care Center*, 233 N.L.R.B. 1425, 1429 (1977); *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 enforcement denied on other grounds, 310 F. 2d 233 (5th Cir. 1962).

in vain" for evidence of conduct "looking toward group action" (*id.* at 4a). The court's application of these universally accepted legal standards to the uncontroverted facts demonstrates that no conflict exists between the Fifth Circuit's decision and the decisions of other circuit courts of appeals.

3. Similarly, the Fifth Circuit's analysis of the Section 8(a) (3) claim is not in conflict with the decisions of other courts of appeals (Petition, pp. 7-11). Respondent agrees that an employer violates Section 8(a) (3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a) (3) and (1), if he discharges an employee "expressly because the employee said that she would like to have a union at the plant" (Petition, p. I). Respondent concurs that the decisions in *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706 (1st Cir. 1975), and *Signal Oil & Gas Co. v. NLRB*, 390 F. 2d 338 (9th Cir. 1968), hold that an employer violates Section 8(a) (3) and (1) of the Act by discharging an employee for prounion remarks. However, the Fifth Circuit found that Willie was discharged as a result of a personal dispute with Welch (App. A, *infra*, p. 4a). In the *Ethan Allen* and *Signal Oil & Gas* cases, the courts of appeals found that the employers were motivated by antiunion considerations.¹³

The Fifth Circuit did not, as Petitioner suggests, require an employee's participation in protected concerted

¹³See *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706, 707 (1st Cir. 1975); *Signal Oil & Gas Co. v. NLRB*, 390 F. 2d 338, 341 (9th Cir. 1968). Indeed, if the fact situation presented in *Ethan Allen* or *Signal Oil & Gas* had been present in this case, the court would have ruled differently. See *NLRB v. Charles H. McCauley Assocs., Inc.*, 657 F. 2d 685, 688 (5th Cir. 1981) (employer violated Sections 8(a)(1) and (3) by discharging employee for expressing prounion statements).

activities in order to find a violation of Section 8(a) (3).¹⁴ Section 8(a) (3) of the Act prohibits the discharge of an individual to discourage his participation in a labor organization. A violation of Section 8(a) (3) requires *intent* to discourage union activity on the part of the employer. *Metropolitan Edison Co. v. NLRB*, 103 S. Ct. 1467, 1473 (1983); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 313 (1965). When the court determined that Willie's discipline was *not* motivated by antiunion concerns, but by a *personal dispute*, its Section 8(a) (3) inquiry was at an end.¹⁵ Consequently, the Fifth Circuit's analysis has not created any conflict among the courts of appeals.

4. The question presented, properly framed, does not involve a significant issue concerning the administration of the National Labor Relations Act. The Fifth Circuit's decision turns solely upon the particular facts involved.

¹⁴Petitioner contends the court of appeals erred by requiring proof that "collective worker action is contemplated" (Petition, p. 11 n. 9). The court of appeals, however, stated this was a requirement to find a violation of Section 7 rights. The court did not indicate this requirement applied to Section 8 (a) (3) violations.

¹⁵Having found that Willie's discipline was motivated by her insubordinate actions during a personal dispute with her supervisor, the court of appeals followed the mandate in Section 10(c), 29 U.S.C. § 160 (c), of the Act. Section 10 (c) prohibits the Board from "requir[ing] the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause." In this regard, Justice Burton, in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 474 (1953), stated "[M]any cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the rights of concerted activities. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

In its decision, the court of appeals accepted Willie's version of her argument with Welch (App. A, *infra*, p. 2a). It could have proceeded to find: (1) that Respondent's purpose in disciplining Willie was to discourage union membership; or (2) that Respondent's purpose was to discipline an employee as a result of a personal dispute and insubordination. After examining the record, the court of appeals found Willie's discipline was caused by "a purely personal dispute" (*id.* at 4a). Willie's statement that it would be "nice" to have a union was made in a heated personal argument with Welch. Willie admitted that she was not attempting to initiate any union organizing efforts (Record, Vol. 2, p. 56).

The responsibility to assess the record to determine whether the Board's findings are supported by substantial evidence is not this Court's.¹⁶ In adhering to the standards set forth in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), the Fifth Circuit refused to "rubber stamp" the Board's findings because it could not "conscientiously find that the evidence supporting that decision [was] substantial. . . ." 340 U. S. at 488. Petitioner does not claim that the Fifth Circuit misapprehended or grossly misapplied the substantial evidence standard. Consequently, this Court's intervention is not warranted. 340 U. S. at 491.

The Fifth Circuit correctly recognized that the Board was asking it to establish a *per se* rule that every use of the word "union" elevated individual employee action to that protected by Section 7 (App. A, *infra*, p. 5a). Such a *per se* rule would decimate an employer's ability to con-

¹⁶*Mobil Oil Corp. v. FPC*, 417 U. S. 283, 309-10 (1974).

trol insubordinate employee conduct in the work place as long as an employee interjected the word "union" into his conversation with his employer. Such a radical interpretation of "concerted activity" has never been embraced by the Board or the courts.¹⁷

This Court ordinarily does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The actual difference between the Petitioner's and Respondent's position is the Fifth Circuit's finding that Willie's discipline was the result of a purely personal dispute versus anti-union animus. The court conscientiously applied the substantial evidence rule and found the underlying facts did not support the Board's asserted violations of Section 8 (a) (1) and (3). Factual issues, not legal issues, are in dispute. Accordingly, the Fifth Circuit's decision does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARMIN J. MOELLER, JR.
(Counsel of Record)

W. THOMAS SILER, JR.

June 27, 1983

¹⁷Petitioner contends that the court of appeals mischaracterized the Board's position (Petition, p. 8 n. 5). Yet, the practical effect of the Board's decision would be to allow an individual employee with a personal gripe to confront his supervisors in any disruptive or insubordinate manner he chose and, as long as he expressed pronoun sentiments during the confrontation, his actions would be protected.

APPENDIX A

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

No. 81-4411

Summary Calendar

**SCOOPA MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT**

vs.

**NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER**

Dec. 20, 1982

Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board.

Before CLARK, Chief Judge, POLITZ and HIGGIN-
BOTHAM, Circuit Judges.

PER CURIAM:

Scooba Manufacturing Company produces work gloves at its plant in Shuqualak, Mississippi. Scooba employed Lucille Willie as a sewer at that plant. George Welch was the vice-president of operations until 1980. After a heated argument between Willie and Welch, Willie was discharged. The General Counsel of the National Labor Relations Board alleged that Scooba had violated sections 8(a) (1) and (3) of the National Labor Relations Act by

discharging Willie. An administrative law judge found that Scooba had violated the act, and the Board adopted the ALJ's recommended order. Scooba filed a petition for review before this court, and the Board cross-petitioned for enforcement of its order. Because we conclude that Willie was not engaged in activity protected by the NLRA, we set aside the Board's order, grant the petition for review, and deny the petition for enforcement.

Willie was working at her station one day when she learned that Scooba had fired a fellow employee who also happened to be her son. The trauma of the moment brought on a headache, and she left her station to get some aspirin from Welch's office. A vigorous argument ensued between Willie and Welch regarding her son's discharge. The escalating argument gradually turned to Willie's own work performance and absenteeism. To substantiate his arguments, Welch ordered a plant supervisor to retrieve Willie's production records. When the supervisor returned, Willie started to leave the room. As she reached the doorway, she turned to Welch and angrily proclaimed: "It would be nice if it was a union here. A whole lot of things going on wouldn't be going on." With that, she stormed out.

Desiring to have the last word, Welch summoned Willie. When she returned, he vociferated: "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want." He sent the supervisor to obtain Willie's time records. Willie was given her final paycheck and sent home. Before leaving, Welch told Willie to return the following Monday with her husband to talk about the situation. Willie never returned.

Willie testified that she never engaged in any union activity. No labor organization represented the Scooba workforce. There had never been a union-organizing campaign at the Scooba plant.

Section 7 of the NLRA, 29 U. S. C. § 157, guarantees employees the right to form, join and assist labor organizations, "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection" Scooba has been accused of improperly interfering with those rights.

The mere fact that an employee acts alone does not preclude treatment of his action as a protected activity under the Act. *Richardson Paint v. NLRB*, 574 F. 2d 1195, 1207 (5th Cir. 1978). That individual employee, however, must be engaging in the activity with the object of initiating, inducing or preparing for group action. It is essential that the activity have some relation to group action in the interest of the employees. *NLRB v. McCauley*, 657 F. 2d 685, 688 (5th Cir. 1981); *Anchortank, Inc. v. NLRB*, 618 F. 2d 1153, 1161 (5th Cir. 1980); *NLRB v. Buddies Supermarkets, Inc.*, 481 F. 2d 714, 717-19 (5th Cir. 1973); *Southwest Latex Corp. v. NLRB*, 426 F. 2d 50, 56 n.3 (5th Cir. 1970). Absent substantial evidence that the discharged employee was seeking to instigate some form of group action, dialogue with management is not a protected activity. *NLRB v. Datapoint Corp.*, 642 F. 2d 123, 128 (5th Cir. 1981); *Buddies Supermarkets, Inc.*, 481 F. 2d at 718; *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683, 685 (3d Cir. 1964). See *McCauley*, 657 F. 2d at 688 ("Individual griping and complaining are not protected concerted activity.")

We have searched the record in vain for evidence that Willie's exchange with Welch was "talk looking toward group action." *Buddies Supermarkets* at 718. There is no indication that Willie was acting as a spokeswoman for her fellow employees. The record shows no prior effort at organization by any other employee or group, nor does it show any prior talk about collective bargaining by any employees. Willie's remark was the product of a purely personal dispute with Welch.

The Board argues that we are bound by *NLRB v. McCauley*, 657 F. 2d 685 (5th Cir. 1981). That case is easily distinguishable from this one. In *McCauley*, an employee named Richard Beck talked with at least two of his fellow employees concerning their working conditions and the possibility of unionization. Beck then met with several management officials. He made numerous complaints, and continually emphasized that he was acting on behalf of all employees. One of the supervisors forbade him from discussing the issues with other workers. Beck answered that the company "left him no alternative except to contact the local union representative to come in and try to bargain." *Id.* at 687. Beck was discharged on the spot. We held that Beck's actions "were clearly a predicate for possible group activity." *Id.*

Unlike the employee in *McCauley*, Willie never discussed the possibility of unionization with other Scooba employees. She did not purport to act on behalf of other workers. She did not threaten to contact a union, but merely stated that she thought one would be "nice." It is obvious that *McCauley* involved an entirely different situation from that involved in this case.

In effect, the Board urges that if any employee uses the word "union" in a conversation with his superiors he or she is automatically engaged in protected concerted activity. We do not agree. Purely personal disputes are not within the protection of the Act. The General Counsel must show that some sort of collective worker action is contemplated. That was not done here. We therefore set aside its order. Scooba's petition for review is GRANTED. The Board's cross-petition for enforcement is DENIED.

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 81-4411

SCOوبا MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT,

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING
(January 26, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGIN-
BOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the same
is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

Clerk's Note:

See Rule 41 FRAP and Local Rule 17 for Stay of
the Mandate.

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Supplemental

Brief

FEB 7 1984

ALEXANDER L. STEVAS.

CLERK

NO. 82-1909

In The
Supreme Court of the United States
October Term, 1983

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SCOوبا MANUFACTURING COMPANY,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MEMORANDUM OF RESPONDENT SUGGESTING
THAT THE CAUSE IS MOOT**

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MEMORANDUM OF RESPONDENT SUGGESTING
THAT THE CAUSE IS MOOT

A. INTRODUCTION

The respondent¹ in the above entitled case files this memorandum to advise the Court of certain facts which,

¹Respondent Scooba Manufacturing Company, Inc., a Mississippi corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

in respondent's view, render a major portion of this cause moot.

The questions the petitioner seeks to raise on this appeal are twofold:

(1) Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158(a)(1), protect individual employee conduct in the absence of an extant collective bargaining agreement merely because the individual employee's conduct is deemed to affect other employees (Petition, pp. 6-7); and

(2) Whether the Fifth Circuit's determination that the facts of the instant case did not warrant a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), was erroneous (Petition, pp. 7-8).

B. THE SECTION 7 ISSUE

With regard to the Section 7 issue, the Petitioner states its position as follows:

What [the Fifth Circuit's decision] ignore[s] is that the Board, relying on its expertise in these matters, has concluded that certain conduct undertaken by a single individual inherently affects all other employees and thus is within the coverage of Section 7. Accordingly, the Board argued, *inter alia*, in its petition in *City Disposal Systems, Inc.* (82-960 Pet. 11), that an employee who successfully asserts a right in a collective bargaining agreement necessarily benefits all members of the unit subject to that agreement. Hence, regardless of the specific employee's motive or personal interest in the outcome, the action is still concerted activity Similarly, any pronoun statement made in the course of an employee-management discussion of alleged arbitrary employment practices sufficiently anticipates possible future union activity

to be protected by Section 7. If the Board's position in *City Disposal Systems, Inc.* is sustained by this Court, the Fifth Circuit's requirement of specific evidence of "concertedness" in the present case would necessarily be undermined. . . .

Petition, pp. 6-7 (footnotes and citations omitted).

On January 6, 1984, the National Labor Relations Board rendered a decision in *Meyer Industries, Inc.*, 268 N.L.R.B. No. 73, 115 LRRM 1025 (1984), which overrules a long line of Board cases and completely reverses its position in the instant case. In *Meyers* the Board specifically rejected the "*per se* standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it is of group concern. . . ." 268 N.L.R.B. No. 73, Slip Op. at 10, 115 LRRM at 1028 (emphasis in original). Accordingly, the Board now takes the position that, absent an existing collective bargaining agreement, the General Counsel must prove an individual employee acted "with or on the authority of other employees" in order to be engaged in protected activity. 262 N.L.R.B. No. 73, Slip Op. at 12, 115 LRRM at 1029.

The Board, in its *Meyers* decision, specifically distinguished Section 7's application in cases where no collective bargaining agreement existed and those cases involving an extant collective bargaining agreement. 262 N.L.R.B. No. 73, Slip Op. at 11, 115 LRRM at 1028. Consequently, the Board embraced the respondent's position in the instant case and recognized that the so-called "*Interboro* doctrine," currently under consideration by this Court in *City Disposal Systems, Inc. v. NLRB*, 683 F.2d 1005 (6th Cir. 1982), *cert. granted*, No. 82-960 (March 28,

1983), is fundamentally and conceptually distinguishable from the issue present here.

The *Meyers* decision completely reverses the petitioner's position on the Section 7 issue. As a result, the requisite adversity required to invoke the Court's jurisdiction is lacking thus rendering the issue non-justiciable. See *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979); *Environmental Protection Agency v. Brown*, 431 U.S. 99, 103-04 (1977). Since the intervening *Meyers* decision renders the Section 7 issue moot, and, concomitantly, makes any decision regarding this issue purely advisory in nature, the respondent respectfully submits that the Court should not pass upon this issue.

o

C. THE SECTION 8(a)(3) ISSUE

The Section 8(a)(3) issue presented in the instant case is totally unworthy of this Court's review. Far from presenting a significant legal controversy warranting this Court's attention, the instant case presents only a disputed factual setting over which the parties are at issue (Brief of Respondent, pp. 9-10). Indeed, the Fifth Circuit has consistently applied the legal principles espoused in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980),² and, despite petitioner's assertions to the contrary, did not purport to alter those legal concepts in the instant case. Compare *NLRB v. Associated Milk Prod.*,

²This Court recently approved the Board's *Wright Line* analysis in *NLRB v. Transportation Management Corp.*, — U.S. —, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

Inc., 711 F.2d 627 (5th Cir. 1983) with *NLRB v. Charles H. McCauley Assoc., Inc.*, 657 F.2d 685 (5th Cir. 1981).

Accordingly, the instant case does not merit the Court's review pursuant to its long standing refusal to embroil itself in factual disputes where no significant legal issue is involved. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. CONCLUSION

For these reasons, respondent suggests that the Section 7 issue sought to be raised is moot and should be remanded with a direction to dismiss. Furthermore, the Section 8(a)(3) issue does not warrant this Court's review and the Petition, insofar as it relates to that issue, should be denied.

Respectfully submitted,

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February 6, 1984